89-1824

No. _____

Supreme Court, U.S.
FILED
MAY 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

LAURA J. HARMATH,
Petitioner,

vs.

GEORGE GOLER, M.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

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QUESTION PRESENTED FOR REVIEW

The rights under Ohio Constitution, Article I, Section 2, and Section 16 are denied when a woman exercises her right to an elective abortion which is negligently performed resulting in the birth of a healthy child and her claim against the physician who negligently performed the elective abortion for child rearing expenses is denied.

PARTIES BELOW

The parties below include Laura Harmath, a single unwed 20 year old high school graduate.

Dr. George Goler, a Board Certified Obstetrician-Gynecologist who negligently performed an elective abortion on Laura Harmath on September 12, 1985, which negligence resulted in the birth of a child, Jason Harmath. Dr. Goler's professional corporation Beachwood OB/GYN, Inc., was also made a party Defendant in this case.

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No. _____

IN THE

Supreme Court of the United States

October Term, 1989

LAURA J. HARMATH,
Petitioner,

v.

GEORGE GOLER, M.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Ohio Supreme Court

CITATION TO OPINION BELOW

The citation to the decision of the Ohio Supreme Court is:

Harmath v. Goler (1990), 49 Ohio St. 3d 62, set forth in the Appendix at p. A1.

The decision of the Cuyahoga County Court of Appeals Eighth District is unreported and is set forth in the Appendix at p. A2.

The written decision of the Cuyahoga County Court of Common Pleas dismissing Respondents' claims is set forth in the Appendix at p. A5.

JURISDICTIONAL STATEMENT

Petitioner Laura Harmath prays that a Writ for Certiorari issue to review the judgment of the Ohio Supreme Court entered on February 21, 1990 which affirmed the judgment of the Court of Appeals which affirmed a Motion to Dismiss the Petitioner's Complaint ordered by the trial court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 2 of the Ohio Constitution:

§2 Right to alter, reform, or abolish government, and repeal special privileges.

All political power is inherent in the people, Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly. (See Const 1802, Art VIII, §1.)

Article I, Section 16 of the Ohio Constitution:

§16 [Redress in courts.]

All courts shall be open, and every person for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Ohio Rules of Civil Procedures 12(B)(6):

RULE 12. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on the pleadings

* * * * *

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3)

improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

A. Summary of Procedural History

This case concerns a medical negligence action based on a negligently performed abortion that resulted in the birth of a child.

In 1985 the Petitioner Laura Harmath, hereinafter called "Petitioner" was a twenty year old single, pregnant woman. On September 12, 1985 she went to Mt. Sinai Medical Center for an elective abortion, to be performed by the Respondent, Dr. George Goler. On March 31, 1986, six months after this procedure Miss Harmath gave birth to a baby boy.

The Petitioner commenced a medical negligence action against Dr. George Goler on September 3, 1987. The basis of her claim was that the Respondent negligently performed the elective abortion which resulted in the birth of a child. Her single element of damage was the economic cost of rearing the child.

> As a result of the negligence and unskillfullness of the Defendants, Plaintiff, Laura J. Harmath has incurred the responsibility and economic expenses of raising said baby boy until eighteen years of age, including food, clothing, and shelter, education, medical expenses and other necessities of life.

At the trial level, the Respondents filed a Motion to Dismiss Petitioner's claim as not valid under Ohio law. On November 9, 1987, trial court granted Respondents Motion to Dismiss.

The Petitioner filed her timely Notice of Appeal with the Court of Appeals, Cuyahoga County, Ohio, Eighth Judicial District on November 12, 1987.

On December 22, 1988, while Respondents appeal to the Court of Appeals of the Eighth District was pending, the Eighth District Court of Appeals in a unanimous decision affirmed the judgment of the trial court, in finding in favor of the Respondents. The Court of Appeals relied on *Johnson v. University Hospitals of Cleveland*, and stated that child rearing expenses were not recoverable:

> Recovery of these costs, and therefore a damage award constitutes a windfall to the parents. The benefits of child rearing are too speculative and, therefore, are impossible to weigh against the cost of child rearing. Furthermore, a contrary result would encourage the emotional and psychological upheaval which may occur to the child if he/she later learns of parental rejection before birth, ie., being born as a result of an unwanted pregnancy.

Petitioner filed her timely Notice of Appeal with this Court on January 10, 1989 and jurisdiction was granted.

On February 21, 1990 the Ohio Supreme Court dismissed Petitioner's appeal based on the case of *Johnson v. University Hospitals of Cleveland*, which was decided during the pending of Petitioner's appeal in the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

The denial of Petitioner's claim for child rearing expenses which were imposed on her without her consent violates the Equal Protection clauses of the Ohio Constitution Article 1, Section 2, and the United States Constitution, and the Ohio Constitution Open Courts Amendment Article 1, Section 16.

In Ohio child rearing costs are recoverable in cases resulting from negligently performed sterilization procedures and Petitioner's claim for child rearing expenses resulting from a negligently performed abortion should likewise be a compensable claim.

Under the principles of *Bowman v. Davis*, 48 Ohio St. 2d 41 (1975), child rearing costs are recoverable in the case at bar. In *Bowman* this Court held that a negligently performed sterilization procedure is a traditional negligence action. Further, this Court went on to say that an action for damages for a negligent sterilization procedure was not against public policy.

Mrs. Bowman a mother of four children, underwent a tubal ligation or sterilization procedure in an attempt to avoid any further pregnancies. The tubal ligation was performed by the Defendant Dr. Davis. Ten months after the sterilization procedure, Mrs. Bowman gave birth to twins, one of whom suffered from a congenital abnormality and the other twin was normal and healthy.

Mr. and Mrs. Bowman instituted a medical negligence action against the doctor who performed the tubal ligation seeking four basic types of damages:

1. expenses of or stemming from "the foreseeable consequences of this operation" (these include such "physical complications" and "pain and suffering" as the operation "was designed to prevent");

2. the value of Mrs. Bowman's "society, comfort care and protection" (including consortium) lost to "other members of the family" during and after her "confinement for the birth of the twins");

3. expenses due to "the change in the family status," (including extra money to compensate for the fact that Mrs. Bowman "must spread her society, comfort, care, protection and support over a large group" and extra money to "replenish the family exchequer so that the new arrivals will not deprive other members of the family");

4. economic costs of "rearing" the twins (including, in the case of the abnormal twin, the costs of "institutionalization, care, nursing," and "special attention").

The case was submitted to the jury and a general verdict was returned in the amount of Four Hundred and Sixty-Two Thousand Five Hundred Dollars ($462,500.00). The Court of Appeals affirmed this judgment and it was appealed to the Ohio Supreme Court who affirmed the Court of Appeals.

In its analysis this Court refused to label Mrs. Bowman's claim a "wrongful life" claim or anything other than what it was, a negligence claim:

> . . . Much of appellant's argument is irrelevant. This is not a suit for "wrongful life," which asks the jury to measure damages on the relative merits of being versus non-being. It is, instead a *traditional negligence action.* At the trial, appellees asserted that the appellant was negligent during and after the tubal ligation, that this negligence was the

> proximate cause of the birth of the twins, and that the negligence cost the family the expenses of childbirth and rearing." [emphasis added]

Bowman at p. 45.

The present is not a case of "wrongful life" which is defined as an action brought by a neurologically or congenitally damaged child seeking damages against a physician for negligently permitting his own birth as a deformed child.

The second mandate of *Bowman* is that an action for damages based on a negligently performed sterilization is not against public policy. A specific assignment of error as to whether the damages should be limited to only the expenses of pregnancy was not presented at the appellate level (See footnote #1, *Bowman* at p. 44). However, the Court had before it Assignment of Error #2 which was whether public policy barred the recovery of damages following an unsuccessful sterilization. Also before the Court was the issue that child rearing expenses were an element of damage sought by Mrs. Bowman and submitted to the jury. If the Supreme Court felt that child rearing expenses should not be recoverable or were against public policy they had an opportunity to address that issue through Assignment of Error #2, but this Court in *Bowman* did not choose to do so.

In following *Bowman's* mandate, that a negligently performed sterilization is a traditional tort action and then applying those damages allowable in a negligence claim ie., those that flow directly and proximately from the negligent act, child rearing expenses are a proper element of damage and are recoverable.

Like Mrs. Bowman's cause of action, the Petitioner's action is one of medical negligence and her claim for damages are those that flow from that negligent act. But unlike Mrs. Bowman the Petitioner's cause of action was not recognized as a negligence action by the Court of Appeals and she was denied the recovery of child rearing expenses.

In the case at bar, the Court of Appeals in affirming the trial court's denial of child rearing expenses relied on *Johnson v. University Hospitals of Cleveland* (January 14, 1988), Ohio Appellate No. 53192, Ohio Supreme Court No. 88-485. The Court of Appeals stated:

> Recovery of these costs, and therefore a damage award constitutes a windfall to the parents. The benefits of child rearing are too speculative and, therefore, are impossible to weigh against the cost of child rearing. Furthermore, a contrary result would encourage the emotional and psychological upheaval which may occur to the child if he/she later learns of parental rejection before birth, ie., being born as a result of an unwanted pregnancy.

Johnson ignores the law as set forth in *Bowman* and should not be followed. In the first instance, the Court of Appeals labeled Mrs. Johnson's action based on a negligently performed sterilization, a "wrongful life" action. This totally contradicts the statement in *Bowman* which states that a negligently performed sterilization is a traditional negligence action. *Bowman* at page 45.

The emotional characterization of the present case as a "wrongful life" case adds nothing to the required legal analysis except to interject a moral issue into a traditional negligence case. This attempt to rename an old and established tort, is an attempt to deny damages in an effort by the Respondent to avoid full responsibility for his negligence.

The *Johnson* Court went further and set forth the rationale that birth is a "windfall to the parent and therefore a benefit." To deny Petitioner full recovery by saying as a matter of law that an "unplanned" child is a windfall and benefit to the mother is the ultimate presumptive judicial act. For the Court to ignore a woman's right to choose, when she wishes to begin her family and how large her family must be, regardless of her financial ability to pay the cost of raising a child, is wrong.

For the Courts to create new "benefits" theory for victims of negligence is improper and dangerous. Should we decree that the victim of a breached real estate transaction not be entitled to damages because he has received the "benefit" of a mortgage-free existence? Do we want to say as a matter of law that a negligent doctor whose surgery has caused the death of an elderly patient has bestowed a "benefit" on the patient's family who now does not have to care for and financially support the patient?

Furthermore, to say birth is always a "benefit" to everyone contradicts approved state and national public policies of contraception, abortion and sterilization.

The cases of *Troppi v. Scarf,* 41 Mich. App. 240, 187 N.E.2d 511 (1971); *Sherlock v. Stillwater,* 260 N.W.2d 196 (Minn. 1971); *Ochs v. Borrelli,* 187 Conn. 253, 445 A.2d 883 (1982); and the dissent in *Johnson,* are hereinafter cited to support Petitioner's proposition of law that child rearing expenses are recoverable. However, Petitioner disagrees with the benefit set-off holding in these cases cited, and relies on *Bowman v. Davis, supra* to resist the benefit set-off argument.

Troppi v. Scarf, supra, addresses this argument that a child is always a benefit. In *Troppi* child rearing expenses were recoverable where a pharmacist negligently filled a contraceptive prescription. The Court stated:

> Contraceptives are used to prevent the birth of healthy children. To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant says is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.

Troppi at p. 517.

Johnson also held that the benefits of child rearing are too speculative and therefore are impossible to weigh against the cost of child rearing. Such a claim of speculation ignores the fact that the Petitioner is seeking compensation for a provable financial burden, a burden she sought to avoid by terminating her pregnancy.

Petitioner's economist calculated the child rearing cost to Miss Harmath at One Hundred and Three Thousand Dollars ($103,000.00). This cost is based on nationally recognized standards published by the Department of Labor and other government organizations. These goverment standards are used in courtrooms throughout the country to prove future lost wages, future medical care, rates of inflation, etc. To claim child rearing costs are speculative is to ignore these economic facts.

Also to say as a matter of law that the benefits of child rearing outweigh the financial costs ignores the fact that no amount of love or affection will eliminate the heavy financial burden forced upon the Petitioner.

The Court of Appeals opinion in *Johnson* condemns Laura Harmath to a financial burden that she could not afford and belittles her legitimate, lawful reason for delaying raising a family until she can financially afford to do so. Why should society and the welfare system pay the cost of child rearing while the cause of these expenses, the negligent Respondent, hides behind the "wrongful life" label?

Judge Markus in his dissent in *Johnson v. University Hospitals of Cleveland* carefully addressed this benefit issue:

> The defendants argue that the value of a child necessarily outweighs the cost of that child's support. As a conceptual generality, the *Bowman* decision rejects such a "notion of public policy". As a factual matter, that statement may well describe some family circumstances but not others. For example, a family with minimal resources may have less ability to enjoy the benefits that a new child brings. Indeed, such a family might seek a sterilization procedure because the family anticipates that the economic burden of a new child will outweigh the unquestionable benefits. Absent a legislative resolution of this issue, we should not decide with a wide sweeping generalization that the benefit always outweighs the cost.

Other Courts in finding that child rearing expenses are recoverable have addressed this benefit argument. The Supreme Court of Minnesota in *Sherlock v. Stillwater, supra*, stated:

> Although public sentiment may recognize that the vast majority of parents, the long term and enduring benefits of parenthood outweigh the economic costs of rearing a healthy child, it would

> be simply *myopic* to declare today that those benefits exceed the cost as a matter of law. [emphasis added]

Sherlock at p. 175.

The Supreme Court of Connecticut in *Ochs v. Borrelli, supra*, in affirming costs of child rearing stated:

> . . . Raising a child from birth to maturity is a costly enterprise, and hence, injurious although it is an experience that abundantly recompenses most parents with intangible rewards. There can be no affront to public policy in our recognition of these costs and no inconsistency in our view that parental pleasures soften but do not eradicate economic reality.

Ochs at p. 886.

In the present case, the Court of Appeals other reason for denying Harmath child rearing costs was:

> To allow such cost will encourage the emotional and psychological upheaval which may occur to the child if he/she later learns of parental rejection before birth.

This argument is unfounded and should not be a reason for the denial of child rearing costs.

Judge Markus, in the dissent in *Johnson*, addressed this issue:

> Finally, the resulting stigma is not significantly different than when the court permits damages for the cost of support, or limits recovery to damages directly incident to the pregnancy. In either case, the plaintiff publicly announces that this was an unintended or unwanted child. *Bowman* unequivocally established that Ohio permits recovery for the damages directly attributable to the unwanted pregnancy.

> The Defendants argue that the parent may deprecate the child's value in seeking to reduce the offset for the related benefit. However, any resulting stress, if the child later learns about such testimony, may be less than the child's stress in maturing without adequate financial support.

This "stigma" of the child learning that there was a case pursued by his mother could be avoided by the case being filed under the name of Jane Doe.

In addition, the weighing and balancing of the possible adverse reaction of the child learning that his birth was undesired is not a test that should be performed by the judiciary. The weighing of these interests should be done by the parents. Adoptive parents have always weighed these interests when deciding whether to tell their child that he is adopted and parents have done so successfully without judicial interference or condemnation.

The Court in *Bowman* in holding that Mrs. Bowman's action for damages was not against public policy, reaffirmed the fundamental right to privacy ie., the choice to procreate. The Court reasoned that to deny a cause of action for damages based on this right to privacy would be an "impermissible infringement" of a Constitutional right:

> It is the opinion of this court that the cause of action pursued successful by the Bowmans at the trial and appellant level is not barred by notions of public policy. The choice not to procreate, as part of one's right to privacy has become (subject to certain limitations) a Constitutional guarantee. See *Griswold v. Connecticut* (1965), 381 U.S. 479; *Roe v. Wade* (1973), 410 U.S. 113; and *Doe v. Bolton* (1973), 410 U.S. 179. For this court to endorse a policy that makes physicians liable for the foreseeable

> consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right.

To recognize a right but to deny a full remedy for violation of the right is to not recognize the right at all.

Both Petitioner Miss Harmath and Mrs. Bowman attempted to exercise their right to privacy, Mrs. Bowman sought to avoid childbirth permanently by having a tubal ligation and Miss Harmath sought to avoid a single pregnancy by terminating it through an abortion. But as a result of the Respondents' negligence they were prevented from exercising their right and a full remedy should be available to Laura Harmath.

Bowman is clear in its refusal to limit the liability of physicians who perform negligent sterilization operations:

> For this court to endorse a policy that makes physicians liability for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute impermissible infringement of a fundamental right.

Bowman at p. 46.

To limit doctors liability for a major element of the damage they cause would have the effect of giving them immunity.

The case of *Schork v. Huber*, 48 S.W.2d 861 (Ky. 1983) is instructive in this regard. The better reasoned opinion, the dissent by Justice Leibson, stated:

> In our world, there are so many businesses and professions whose negligent acts can cause great harm and damage. They are still held accountable in terms of civil liability. Airplanes loaded with

> passengers crash in midair. An overhang walkway collapses to the floor in a crowded hotel lobby. A defective product, or chemical spill, causes serious injuries or death to a vast number of people. Continued availability of traditional tort remedies protect the victims in cases much more burdensome than the present one and continue to provide incentive for reasonable care. We cannot absolve a physician of liability for the expenses reasonably foreseeable for the cost of raising a child simply because it may be burdensome. To do so is to limit the action to a relatively insignificant portion of the damages caused by his negligence. The physician who undertakes to provide medical treatment in the form of sterilization should not be afforded immunity from the major consequences of his negligence.

Id., at 867.

There exists no legislative grant of immunity to physicians who perform these operations and there should be no judicial grant of such immunity from full responsibility for all the damages that result from their negligence.

Finally, to single out one class of injured persons ie., those who have sterilization or abortion procedures, and to deny them a complete recovery for all the damages that they have suffered is discriminatory and a denial of Due Process and Equal Protection guaranteed by the Ohio and United States Constitution. Nor can recovery of child rearing expenses be dependent upon whether the child born is healthy or not. Regardless of the health of the child the mother's financial responsibilty for food, clothing, education, shelter exists to the age of eighteen (18).

CONCLUSION

For the Ohio Supreme Court to deny child rearing expenses to Petitioner is to punish her by saddling her with a financial burden she lawfully sought to avoid, but which was forced upon her by the Respondent's negligence. Therefore to exert the economic pressure of child rearing costs, for exercising a legitimate recognized right is coercion, which should never be condoned in Ohio. Denying child rearing expenses to the Petitioner would have the effect of granting the Respondent a windfall by allowing him to escape full financial responsibility for his negligence.

Miss Harmath, in choosing to have an abortion, made the choice to delay raising a family until the time her employment, career, marital status and financial and emotional stability were all in place. The choice she made to delay having a family and exercising control over her life was denied by the Respondent's negligence.

For these reasons, Petitioner requests this Honorable Court to grant her writ.

Respectfully submitted,

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APPENDIX

DECISION OF THE SUPREME COURT OF OHIO

(Decided February 21, 1990)

No. 89-97

THE SUPREME COURT OF OHIO
COLUMBUS

LAURA J. HARMATH,
Appellant,

vs.

GEORGE GOLER, M.D., *et al.*,
Appellee.

[Cite as Harmath *v.* Goler (1990), 49 Ohio St. 3d 62.]

Medical malpractice—"Wrongful pregnancy" (failed abortion) action—"Limited damages" rule applicable to birth of normal, healthy child.

(No. 89-97—Submitted January 24, 1990—Decided February 21, 1990.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 54811.

Don C. Iler Co., L.P.A., Don C. Iler and *Nancy C. Iler,* for appellant.

Jacobson, Maynard, Tuschman & Kalur Co., L.P.A., Susan M. Reinker and *Janis L. Small,* for appellees.

This cause is affirmed on authority of *Johnson v. University Hospitals of Cleveland* (1989), 44 Ohio St. 3d 49, 540 N.E. 2d 1370.

MOYER, *C.J.*, SWEENEY, HOLMES, DOUGLAS, WRIGHT and RESNICK, *JJ.*, concur.

H. BROWN, *J.*, dissents.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

(Decided December 22, 1988)

No. 54811

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

LAURA J. HARMATH,
Plaintiff-Appellant,

vs.

GEORGE GOLER, M.D., *et al.*,
Defendants-Appellees.

JOURNAL ENTRY AND OPINION

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court, No. 135,453.

JUDGMENT: Affirmed.

DAVID T. MATIA, *P.J.*:

Plaintiff-appellant, Laura J. Harmath, appeals from the Cuyahoga County Court of Common Pleas' decision to grant defendant-appellee, George Goler, M.D.'s motion to dismiss pursuant to Civ. R. 12(B)(6) for failure to state a claim upon which relief may be granted. Appellee performed an unsuccessful abortion on appellant in September 1985.

In March 1986 appellant gave birth to an apparently healthy baby boy. Appellant sues in negligence for the cost of raising her child to the age of majority.

Appellant's sole assignment of error contends that:

"THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CAUSE OF ACTION FOR CHILD REARING EXPENSES CAUSED BY THE DEFENDANT'S MEDICAL NEGLIGENCE."

In *Johnson v. University Hospitals of Cleveland* (Jan. 14, 1988), Cuyahoga App. No. 53192, unreported, this court held that in cases such as that *sub judice*, the expenses incurred in raising a healthy child are not recoverable:

> "Recovery of these costs, and therefore a damage award constitutes a windfall to the parents. The benefits of child rearing are too speculative and, therefore, are impossible to weigh against the cost of child rearing. Furthermore, a contrary result would encourage the emotional and psychological upheaval which may occur to the child if he/she later learns of parental rejection before birth, i.e., being born as a result of an unwanted pregnancy."

Thus, the trial court did not err in granting appellee's motion to dismiss since appellant can prove no set of facts entitling her to recovery and, therefore, fails to state a claim upon which relief may be granted. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St. 2d 242. For this reason, appellant's assignment of error is not well taken.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DYKE, *J.*, and
NAHRA, *J.*, concur.

/s/ DAVID T. MATIA
Presiding Judge

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

A5

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Dated November 6, 1987)

No. 135453

IN THE COURT OF COMMON PLEAS

LAURA HARMATH,
Plaintiff,

vs.

GEORGE GOLER, M.D., *et al.*,
Defendant.

Defendant's Motion to Dismiss is Granted.

MICHAEL J. CORRIGAN
Judge

Supreme Court, U.S.
FILED
JAN 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1824

IN THE

Supreme Court of the United States

October Term, 1989

LAURA J. HARMATH,
Petitioner,

v.

GEORGE GOLER, M.D., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Johnson v. University Hospitals of Cleveland (1989), 44 Ohio St. 3d 49, 540 N.E.2d 1370 ..... *passim*

Michigan v. Long, 463 U.S. 1032 (1983) 4,9

Tacon v. Arizona, 410 U.S. 350 (1973) 10,11,12

No. 89-1824

IN THE

Supreme Court of the United States

October Term, 1989

LAURA J. HARMATH,
Petitioner,

vs.

GEORGE GOLER, M.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents request that this Court deny Petitioner's Writ of Certiorari seeking review of the Ohio Supreme Court's opinion in this case reported at 49 Ohio St. 3d 62.

I. STATEMENT OF THE CASE AND FACTS

On September 12, 1985, Plaintiff-Petitioner ("Petitioner") was admitted to the Mt. Sinai Medical Center in Cleveland, Ohio, for the purpose of having an elective abortion performed by George Goler, M.D. Petitioner contends that, as a direct and proximate result of Dr. Goler's failure to terminate her pregnancy, she gave birth to a baby boy, Jayson, on March 31, 1986. There is no dispute that Jayson is a normal, healthy child.

On September 3, 1987, Petitioner filed this action in the Cuyahoga County Common Pleas Court against Defendants-Respondents ("Respondents") George Goler, M.D. and his corporation, Beachwood OB/GYN, Inc. Petitioner's complaint alleged that Respondent Dr. Goler negligently performed an abortion, and as a result Petitioner gave birth to a healthy baby boy. Petitioner's complaint sought damages solely for the child-rearing expenses of her son until the age of eighteen.

On October 26, 1987, Respondents filed a motion to dismiss pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure. The basis for Respondents' Motion to Dismiss was that Ohio law did not recognize a cause of action to recover the costs of raising a healthy child. On November 9, 1987, the trial court granted Respondents' motion to dismiss over Petitioner's objection. Petitioner filed a timely notice of appeal to the Eighth District Court of Appeals of Ohio.

On December 22, 1988, the Ohio Eighth District Court of Appeals unanimously affirmed the trial court's dismissal of Petitioner's complaint. *Harmath v. Goler, M.D.* (Dec. 22, 1988), Cuyahoga App. No. 43811, unreported (copy attached in the Appendix.) Petitioner then filed a timely notice of appeal to the Ohio Supreme Court, which accepted jurisdiction over this case on March 1, 1989.

On February 21, 1990, the Ohio Supreme Court issued an opinion, reported at 49 Ohio St. 3d 62, which stated in its entirety as follows:

> This cause is affirmed on authority of *Johnson v. University Hospitals of Cleveland* (1989), 44 Ohio St. 3d 49, 540 N.E.2d 1370.

(A copy of the Ohio Supreme Court's opinion, as well as a copy of *Johnson*, are attached in the Appendix.) Petitioner filed a timely Writ of Certiorari to this Court.

II. WHY PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED

A. The Ohio Supreme Court's Decision In This Case Rests Solely Upon Independent State Grounds And Does Not Present Any Federal Question.

It is well established that this Court will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *Chandler v. Florida*, 449 U.S. 540, 570 (1981); *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *Intern. Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986).

> *Respect for the independence of state courts, as well as avoidance of rendering advisory opinions have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.* It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. (Emphasis added.)

Michigan v. Long, supra at 1040.

If the state court decision indicates clearly and expressly that it is based on *bona fide* separate, adequate, and independent grounds, this Court has consistently held that it will *not* undertake review of the decision. (*Id.* at 1041.)

In this case, the Ohio Supreme Court affirmed, without opinion, the Eighth District Court of Appeals' decision on the authority of *Johnson v. University*

Hospitals of Cleveland (1989), 44 Ohio St. 3d 49, 540 N.E.2d 1370. (Copy in Appendix.) Therefore, this Court's jurisdiction is determined by whether *Johnson* was decided upon separate, adequate and independent state grounds.[1]

In *Johnson* the Plaintiff, Ruth Johnson, underwent an unsuccessful tubal ligation in March, 1982. In April of 1983, Ms. Johnson delivered a healthy baby girl. Ms. Johnson then filed a medical malpractice action against the hospital and her three physicians. An arbitration panel found in Johnson's favor and against University Hospitals and one physician. *Johnson, supra*, at 50. However, the arbitration panel found that Ms. Johnson was not entitled to any child-rearing expenses since any monetary expense is substantially outweighed by the offsetting value of her child's love, aid, comfort and society. (*Id.*) Johnson filed an appeal *de novo* from the arbitration award, but subsequently settled all her damage claims, except her claim for child-rearing costs.

Defendants moved to dismiss Johnson's claim for damages. The trial court granted defendant's motions to dismiss on the ground that "under Ohio law there is no legally cognizable claim for wrongful birth or wrongful pregnancy." The trial court also found that Johnson may not recover the additional expense to raise a healthy child to the age of majority. (*Id.*)

The Court of Appeals affirmed, holding that Ohio recognizes a claim for wrongful pregnancy, but limited the recoverable costs to "damages arising from the

[1] Petitioner failed to recognize or disregarded the importance of the *Johnson* decision to this Court's jurisdiction since Petitioner's Writ fails to even cite *Johnson, supra*. Instead, Petitioner repeatedly cites to the unreported Court of Appeals decision in *Johnson, supra*, and virtually ignores the decision of the Ohio Supreme Court in *Johnson*.

pregnancy itself." (*Id.* at 51.) The Court of Appeals further held that a child is a benefit *per se* and thus a parent can never be damaged by the birth of a normal, healthy child. (*Id.*)

The Ohio Supreme Court affirmed the judgment of the Court of Appeals. The *Johnson* court stated: "whether child-rearing expenses are recoverable in a 'wrongful pregnancy' action in Ohio is a question of first impression."[2] (*Id.* at 52.) The *Johnson* court further stated: "Numerous jurisdictions have already addressed this issue and four theories of recovery of damages in a 'wrongful pregnancy' action have developed." (*Id.*) The court summarized these four theories by citing case law from Tennessee, Minnesota, Pennsylvania, Nevada, Utah, Connecticut, Arizona, Wyoming, Florida, Texas,

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[2] In her Writ, Petitioner relies heavily upon *Bowman v. Davis* (1976), 48 Ohio St. 2d 41, 356 N.E.2d 496, for the proposition that child-rearing expenses are a proper element of recoverable damages in a negligently performed sterilization. However, in *Johnson*, the Ohio Supreme Court stated as follows:

> *Bowman* did not directly address the measure of damages in a 'wrongful pregnancy' action. The court said at 44, 2 O.O.3d at 134, 356 N.E.2d at 498, fn. 1: 'A third issue, that appellees' damages should be limited to the expenses of the *pregnancy* after a negligently performed sterilization, was not raised at the appellate level. To the extent that this issue is not settled in our discussion of appellant's other propositions of law, we decline to decide it. ***' (Citations omitted.) (Emphasis *sic.*)

Petitioner's theory of full recovery for her wrongful pregnancy is specifically denied by the *Johnson* court when it stated as follows:

> Several courts contend that *Bowman* adhered to the rule allowing a full recovery of damages. However, as we stated previously, *Bowman* did not address the measure of damages recoverable in a 'wrongful pregnancy' case. (Footnote omitted.)

As stated in *Johnson*, the *Bowman* decision is clearly inapplicable to Petitioner's claim since *Bowman* was not presented with the same issue present in this case.

Washington, Wisconsin, Delaware, Kansas, North Carolina and California. After reviewing how other states decided this issue, the *Johnson* court stated as follows:

> *We come now to decide which course of action is best for Ohio.* In doing so, we comment that this has been one of the most difficult cases we have been called upon to decide. Our occupational duty continuously requires us to balance rights and responsibilities of persons regardless of their color, sex, position or station in life. We accomplish that balancing in this case while recognizing that our decision will be something less than universally accepted.
>
> * * *
>
> After reviewing the four theories of recovery, we find the limited damages theory is the most persuasive rule. *In Ohio, a tort recovery may not be had for damages which are speculative.* See *Day v. Gulley* (1963), 175 Ohio St. 83, 23 O.O.2d 382, 191 N.E.2d 732. Allowing a jury to award child-rearing costs would be to invite unduly speculative and ethically questionable assessments of such matters as the emotional effect of a birth on siblings as well as parents, and the emotional as well as the pecuniary costs of raising an unplanned and, perhaps, unwanted child in varying family environments.
>
> *Additionally, these speculative expenses for child rearing in a 'wrongful pregnancy' action were not recognized at common law,* just as damages were not recognized in an action for 'wrongful death'. *We believe that if such expenses are to be recognized, it is the role of the General Assembly to establish guidelines in a 'wrongful pregnancy' action* as the legislature has done in allowing damages in 'wrongful death' actions. (Emphasis added.) (Footnote omitted.)

(*Id.* at 58.)

Finally, in paragraph two of the syllabus,[3] the *Johnson* court held:

> In a 'wrongful pregnancy' action, *Ohio recognizes the 'limited damages' rule which limits the damages to the pregnancy itself* and does not include child-rearing expenses. The extent of recoverable damages is limited by *Ohio's public policy that the birth of a normal, healthy child cannot be an injury to her parents.*

(Emphasis added.)

The syllabus of *Johnson*, as well as the basis of the decision, unequivocally establish that *Johnson* was decided upon adequate and independent state grounds. The *Johnson* court did not cite or rely upon either the Ohio Constitution or the United States Constitution to arrive at the decision. Furthermore, the *Johnson* decision did not cite or rely upon *any* federal case or statute.

In *Johnson*, the Ohio Supreme Court determined, on the basis of Ohio law and Ohio public policy, that Ohio will limit the possible amount awardable to plaintiffs asserting a tort claim for "wrongful pregnancy". The *Johnson* court arrived at this conclusion primarily by relying upon the rule, set forth in an Ohio Supreme Court case, that in Ohio "a tort recovery may not be had for damages which are speculative." *Johnson, supra*, at 58. The *Johnson* court further stated that if child-rearing expenses are to be recognized as awardable for a "wrongful pregnancy" action, then the Ohio General Assembly should enact a statute providing for such recovery. *Id.*

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[3] In Ohio, the syllabus of a Supreme Court opinion sets forth the controlling point of law decided in the specific case. *Thomas v. Arn*, 474 U.S. 140, n.3 (1985); see *Engle v. Isaac*, 456 U.S. 107, 111, n.3 (1982).

The *Johnson* decision presented absolutely no federal question and was based solely upon an independent state ground. In this case, the Ohio Supreme Court affirmed the Court of Appeals judgment based upon the *Johnson* decision. Therefore, the Ohio Supreme Court decision in this case lacks *any* federal question and was based *entirely* upon independent state grounds. Accordingly, this Court is without jurisdiction to grant Petitioner's Writ of Certiorari. *Herb, supra; Long, supra.*

B. Petitioner Failed To Raise Any Constitutional Issues In The Trial Court, The Court of Appeals, Or The Ohio Supreme Court.

In *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969), this Court held as follows:

> *It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.* In *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391. The court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion *** and since.
>
> * * *
>
> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. *And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge,* since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

(Citations omitted.) (Emphasis added.)

See *Illinois v. Gates*, 462 U.S. 213, 219 (1983) (When a State Supreme Court does not pass upon a question of constitutionality, this Court may not do so); *Tacon v.*

Arizona, 410 U.S. 350, 352 (1973); and *Howlett v. Rose*, _____ U.S. _____, 58 L.W. 4755, 4759, n. 16 (1990).

In this case, after the trial court granted Respondents' motion to dismiss, Petitioner asserted the following sole assignment of error to the Court of Appeals:

> The Trial Court Erred In Dismissing Plaintiff's Cause Of Action For Child Rearing Expenses Caused By The Defendant's Medical Negligence.

See *Harmath v. Goler, M.D.* (Dec. 22, 1988), Cuyahoga App. No. 54811, unreported at 2 (copy in the Appendix.) Petitioner did not assert any constitutional arguments in the Court of Appeals. In passing upon Petitioner's assignment of error, the Court of Appeals did not cite or rely upon any provision of the Ohio or United States Constitutions.

Petitioner then filed a Memorandum in Support of Jurisdiction to the Ohio Supreme Court. The Petitioner's sole proposition of law asserted to the Ohio Supreme Court follows:

> A Medical Malpractice Action Based On A Negligently Performed Abortion Is A Traditional Tort Claim And Plaintiff Is Entitled To Recover All Those Damages That Flow Proximately From The Defendants (sic) Negligence Including Child Rearing Expenses.

Without opinion, the Ohio Supreme Court affirmed the Court of Appeals decision on the authority of *Johnson v. University Hospitals of Cleveland* (1989), 44 Ohio St. 3d 49, 540 N.E.2d 1370. The *Johnson* case did not cite or rely upon any provision of the Ohio or United States Constitutions.

Petitioner's Writ of Certiorari, for the *first time* in this case, asserts that her equal protection rights under the Ohio and United States Constitutions, as well as the Open Courts provision of the Ohio Constitution, were violated by the Ohio Supreme Court's decision in this case. Petitioner failed to raise *any* constitutional argument in *any* of the state courts, and the Ohio Supreme Court did not pass upon any constitutional issues when it decided this case. Yet Petitioner expects this Court to grant her review on a constitutional issue raised for the *first time* to this Court. This Court has repeatedly and expressly rejected such attempts at "bootstrapping" this Court with jurisdiction to review State Supreme Courts. *Cardinale, supra; Tacon, supra.*

Accordingly, Petitioner's failure to raise constitutional issues in the Ohio courts precludes Petitioner from raising such issues for the first time to this Court. Petitioner's Writ of Certiorari should be denied.

III. CONCLUSION

Based upon the foregoing, Respondents George Goler, M.D. and his corporation, Beachwood OB/GYN, Inc. request that this Court deny Petitioner's Writ of Certiorari.

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Counsel for Respondents

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI has been forwarded by regular U.S. Mail, postage prepaid, on this _____ day of July, 1990, to:

DON. C. ILER
NANCY C. ILER
Don C. Iler Co., L.P.A.
1640 Standard Building
Cleveland, Ohio 44113
(216) 696-5700

Counsel for Petitioner

ROBERT C. MAYNARD
ROBERT C. MAYNARD

APPENDIX

DECISION OF THE SUPREME COURT OF OHIO

(Decided February 21, 1990)

No. 89-97

THE SUPREME COURT OF OHIO
COLUMBUS

LAURA J. HARMATH,
Appellant,

vs.

GEORGE GOLER, M.D., *et al.*,
Appellee.

[Cite as Harmath *v.* Goler (1990), 49 Ohio St. 3d 62.]

Medical malpractice—"Wrongful pregnancy" (failed abortion) action—"Limited damages" rule applicable to birth of normal, healthy child.

(No. 89-97—Submitted January 24, 1990—Decided February 21, 1990.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 54811.

Don C. Iler Co., L.P.A., Don C. Iler and *Nancy C. Iler,* for appellant.

Jacobson, Maynard, Tuschman & Kalur Co., L.P.A., Susan M. Reinker and *Janis L. Small,* for appellees.

This cause is affirmed on authority of *Johnson v. University Hospitals of Cleveland* (1989), 44 Ohio St. 3d 49, 540 N.E. 2d 1370.

MOYER, *C.J.*, SWEENEY, HOLMES, DOUGLAS, WRIGHT and RESNICK, *JJ.*, concur.

H. BROWN, *J.*, dissents.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

(Decided December 22, 1988)

No. 54811

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

LAURA J. HARMATH,
Plaintiff-Appellant,

vs.

GEORGE GOLER, M.D., *et al.*,
Defendants-Appellees.

JOURNAL ENTRY AND OPINION

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court, No. 135,453.

JUDGMENT: Affirmed.

DAVID T. MATIA, *P.J.*:

Plaintiff-appellant, Laura J. Harmath, appeals from the Cuyahoga County Court of Common Pleas' decision to grant defendant-appellee, George Goler, M.D.'s motion to dismiss pursuant to Civ. R. 12(B)(6) for failure to state a claim upon which relief may be granted. Appellee performed an unsuccessful abortion on appellant in September 1985.

In March 1986 appellant gave birth to an apparently healthy baby boy. Appellant sues in negligence for the cost of raising her child to the age of majority.

Appellant's sole assignment of error contends that:

"THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CAUSE OF ACTION FOR CHILD REARING EXPENSES CAUSED BY THE DEFENDANT'S MEDICAL NEGLIGENCE."

In *Johnson v. University Hospitals of Cleveland* (Jan. 14, 1988), Cuyahoga App. No. 53192, unreported, this court held that in cases such as that *sub judice*, the expenses incurred in raising a healthy child are not recoverable:

> "Recovery of these costs, and therefore a damage award constitutes a windfall to the parents. The benefits of child rearing are too speculative and, therefore, are impossible to weigh against the cost of child rearing. Furthermore, a contrary result would encourage the emotional and psychological upheaval which may occur to the child if he/she later learns of parental rejection before birth, i.e., being born as a result of an unwanted pregnancy."

Thus, the trial court did not err in granting appellee's motion to dismiss since appellant can prove no set of facts entitling her to recovery and, therefore, fails to state a claim upon which relief may be granted. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St. 2d 242. For this reason, appellant's assignment of error is not well taken.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DYKE, *J.*, and
NAHRA, *J.*, concur.

/s/ DAVID T. MATIA
Presiding Judge

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

DECISION OF THE SUPREME COURT OF OHIO IN JOHNSON V. UNIVERSITY HOSPITALS OF CLEVELAND

No. 88-485

THE SUPREME COURT OF OHIO

COLUMBUS

RUTH JOHNSON,
Appellant,

v.

UNIVERSITY HOSPITALS OF CLEVELAND, *et al.*,
Appellees.

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[49] [Cite as Johnson *v.* University Hospitals of Cleveland (1989), 44 Ohio St. 3d 49.]

Medical malpractice—"Wrongful pregnancy" action—"Limited damages" rule applicable to birth of normal, healthy child—Mother need not mitigate damages by abortion or adoption.

O.Jur. 3d Malpractice §35.

1. In a "wrongful pregnancy" action, the mother need not mitigate damages by abortion or adoption since a tort victim has no duty to make *unreasonable* efforts to diminish or avoid prospective damages.

2. In a "wrongful pregnancy" action, Ohio recognizes the "limited damages" rule which limits the damages to the pregnancy itself and does not include child-rearing expenses. The extent of recoverable damages is limited by Ohio's public policy that the birth of a normal, healthy child cannot be an injury to her parents.

(No. 88-485—Submitted March 28, 1989—
Decided July 5, 1989.)

APPEAL from the Court of Appeals
for Cuyahoga County, No. 53192.

On July 27, 1983, appellant, Ruth Johnson, filed a claim against appellees, University Hospitals of Cleveland ("University Hospitals") and three doctors employed by University Hospitals. Appellant alleged that she had undergone a tubal ligation for sterilization purposes at University Hospitals which was negligently performed by the three appellee-doctors on March 4, 1982. As a result, Johnson was not sterilized, and she became [50] pregnant in July 1982, delivering a baby girl on April 27, 1983.

In her complaint, Johnson requested damages for pain and suffering arising out of the pregnancy and birth, for damages for injury to her person caused by the increased care, responsibility and work involved in raising a child, and for child-rearing expenses.

In Paragraph 10 of the complaint, Johnson specifically alleged that "*** as a result of defendants' negligence, the birth of said female child will require great additional cost and expense to properly care for and raise said child to the age of maturity, a sum which is estimated to be approximately Three Hundred Thousand Dollars ($300,000.00)."

Pursuant to Loc. R. 37 of the Court of Common Pleas of Cuyahoga County, General Division, the court submitted Johnson's medical claim to a medical arbitration panel. Based on a suggestion of University Hospitals, the court instructed the arbitrators that if they found any defendant liable, damages could include:

> "1) Reasonable medical and hospital costs incurred by plaintiff and related to the prenatal care of plaintiff, the cost of the delivery and post-delivery medical and hospital care related to the birth of the child;
>
> "2) Pain and suffering of plaintiff, if any, resulting from the pregnancy and delivery of the child;
>
> "3) Reasonable medical and hospital expenses incurred by plaintiff and related to any subsequent sterilization procedure;
>
> "4) Reasonably foreseeable expenses to be incurred by the parents in maintaining, supporting, and educating the child to the age of majority, offsetting such expense by the economic value to the parents and the family of the child's love, aid, comfort, and society which will benefit the parents for the duration of the parents' lives, including the pecuniary benefits that the parents might reasonably expect from the child after reaching majority."

The arbitration panel recommended a finding in favor of Johnson against University Hospitals and one of the physicians. However, the panel found that Johnson was not entitled to any child-rearing expenses since any monetary expense is "*** substantially outweighed by the offsetting value of her [the child's] love, aid, comfort and society.***" The panel assessed all Johnson's

remaining damages at $12,500.[1] Johnson appealed the arbitration award on November 6, 1986 to obtain a trial *de novo*. She subsequently settled all her claims for damages with appellees except her claim for child-rearing costs.

Appellees moved the trial court to dismiss or, in the alternative, for summary judgment as to the claim alleged for costs to support the child until the age of majority. The trial court granted appellees' motion on the grounds that "under Ohio law there is no legally cognizable claim for wrongful birth or wrongful pregnancy and as a matter of law plaintiff [Johnson] may not recover the 'additional cost and expense to properly care for and raise' a healthy child to the age of majority."

Johnson appealed this decision to the court of appeals. On January 25, 1988, in a two-to-one decision, the court of appeals held that Ohio recognizes a claim for wrongful [51] pregnancy, but limited the recoverable costs to "damages arising from the pregnancy itself ***, *i.e.*, delivery fees, prenatal care, loss of spousal consortium and services during pregnancy, pain and suffering during pregnancy and child birth, etc." The court upheld the trial court's denial of child-rearing expenses for a normal, healthy child for several reasons. The court stated that a child is a benefit *per se*. Thus, a parent can never be damaged by the birth of a normal, healthy child. Furthermore, the court of appeals found that recovery of the costs of raising a child would be a windfall to the parents, that the benefits of child rearing are too speculative and, therefore, are impossible to weigh against the cost of child rearing, and that allowing a recovery for child-rearing expenses might harm the

[1] There is some confusion about the recommended award by the arbitration panel. At one point, the arbitrators claim the award is $12,500, at another point $12,000.

child emotionally and psychologically if the child learned that he or she was unwanted before birth. Appellant appealed this decision.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Law Offices of James E. Behrens, James E. Behrens and *Joseph R. Gioffre,* for appellant.

Arter & Hadden, Robert C. Tucker and *Irene C. Keyse-Walker,* for appellees.

Patrick J. Perotti, urging affirmance for *amicus curiae* Ohio Right to Life Society, Inc.

DOUGLAS, J. The issue raised in this case is whether the parent of a healthy, normal child, born subsequent to a negligently performed sterilization operation, may recover, as an element of damages, the expenses of raising the child.

Numerous cases in other jurisdictions have been reported concerning the type of action before us. These cases have been variously classified as "wrongful pregnancy," "wrongful birth," or "wrongful life." However, a consensus appears to be emerging that several distinct causes of action are described in these categories. *Smith v. Gore* (Tenn. 1987), 728 S.W. 2d 738, 741.

I

An action for "wrongful pregnancy" refers to a suit filed by a parent for proximate damages arising from the birth of a child subsequent to a doctor's failure to properly perform a sterilization procedure. See, *e.g.*, *Jones v. Malinowski* (1984), 299 Md. 257, 473 A. 2d 429. The case before us now is a "wrongful pregnancy" action.

"Wrongful birth," on the other hand, refers to a cause of action whereby parents, on their own behalf, seek to recover damages for the birth of an impaired child when the impairment was caused by the defendant's failure to diagnose or discover a genetic defect in the parents or the infant through prenatal testing or counseling in time for the parent to obtain a eugenic abortion or to prevent pregnancy altogether. See *Smith v. Gore, supra*, at 741.

A "wrongful life" action is brought by a child, on his own behalf, claiming damages due to the negligent failure of physicians to sterilize his parents. *Bowman v. Davis* (1976), 48 Ohio St. 2d 41, 45, 2 O.O. 3d 133, 135, 356 N.E. 2d 496, 499, fn. 3.

This court in *Bowman*, a five-to-two *per curiam* decision, clearly decided that Ohio recognizes a "wrongful pregnancy" action. Such a cause is "*** not barred by notions of public policy. The choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a Constitutional guarantee." (Citations omitted.) *Bowman*, at 46, 2 O.O. 3d at 135, 356 N.E. 2d at 499.

Bowman did not directly address [52] the measure of damages in a "wrongful pregnancy" action. The court said at 44, 2 O.O. 3d at 134, 356 N.E. 2d at 498, fn. 1:

> "A third issue, that appellees' damages should be limited to the expenses of the *pregnancy* after a negligently performed sterilization, was not raised at the appellate level. To the extent that this issue is not settled in our discussion of appellant's other propositions of law, we decline to decide it. ***" (Citations omitted.) (Emphasis *sic.*)

Thus, whether child-rearing expenses are recoverable in a "wrongful pregnancy" action in Ohio is a question of first impression. Numerous jurisdictions have already addressed this issue and four theories of recovery of damages in a "wrongful pregnancy" action have developed. We will review these four theories.

II

A

No Recovery

When cases of this kind were first brought in the United States, courts were hesitant to recognize any cause of action at all. An early case, *Christensen v. Thornby* (1934), 192 Minn. 123, 255 N.W. 620, involved a failed vasectomy. The Minnesota Supreme Court denied any recovery in that case. Subsequently, in *Shaheen v. Knight* (1957), 11 Pa. D. & C. 2d 41, a Pennsylvania common pleas court held that to permit damages for the birth of a healthy child was foreign to the popular sentiment regarding children and the family. Both of these jurisdictions now recognize an action for "wrongful pregnancy."[2]

Recently, at least one other court has taken the position that the birth of a normal child is "*** an event which, of itself, is not a legally compensable injurious consequence even if the birth is partially attributable to the negligent conduct of someone purporting to be able to prevent the eventuality of childbirth." *Szekeres v. Robinson* (Nev. 1986), 715 P. 2d 1076, 1078. Although apparently refusing to recognize the tort of wrongful pregnancy, the court permitted the case to go to trial on the theory of breach of contract. Thus, Nevada is currently the only jurisdiction to adhere to this absolute position of no tort recovery in a "wrongful pregnancy" action, at least when a normal, healthy child is born.

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[2] Subsequently, Pennsylvania adopted the limited damages rule in *Mason v. Western Pennsylvania Hosp.* (1982), 499 Pa. 484, 453 A.2d 974. Minnesota adopted the benefits rule in *Sherlock v. Stillwater Clinic* (Minn. 1977), 260 N.W. 2d 169. However, in a "wrongful birth" case, *Hickman v. Group Health Plan, Inc.* (Minn. 1986), 396 N.W. 2d 10, 14, fn. 5, the court stated in hindsight that, based on the legislative intent embodied in Minn. Stat. Section 145.424, enacted in the interim, "*** our reasoning in *Sherlock* may, perhaps, have been erroneous." Thus, Minnesota's law appears unsettled on this issue.

B

The Benefits Rule

Several jurisdictions recognize that an uninterrupted chain of causation exists between a negligently performed sterilization procedure and the foreseeable consequences of the conception, pregnancy and birth of a normal child. *C.S. v. Nielson* (Utah 1988), 767 P. 2d 504, 510-511, citing, *Smith v. Gore, supra*, at 743.

Thus, these courts believe that "*** it must be recognized that *** [rearing] costs are a direct financial injury to the parents, no different in immediate effect than the medical ex-[53]-penses resulting from the wrongful conception and birth of the child. Although public sentiment may recognize that to the vast majority of parents the long-term and enduring benefits of parenthood outweigh the economic costs of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law. ***" *Sherlock v. Stillwater Clinic* (Minn. 1977), 260 N.W. 2d 169, 175.

Attempting to balance the policy of compensation for the individual tort victim with the broader social values attached to the place of the family in American society, a number of courts have adopted what has become known as the benefits rule. The rule is derived from 4 Restatement of the Law 2d, Torts (1979) 509, Section 920:

> "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable."

In *Jones v. Malinowski, supra*, the Court of Appeals of Maryland followed the benefits rule. The court found that traditional tort principles were applicable to a wrongful pregnancy action, and that "*** the injury to the parents of a normal child does not reside in the product of the negligent act, *i.e.*, the child itself ***. The parents seek damages, not because they do not love and want to keep the unplanned child, but because the direct, foreseeable and natural consequences of the physician's negligence has [*sic*] forced upon them burdens which they sought and had a right to avoid by submitting to sterilization. ***.. *Id.* at 270, 473 A.2d at 435-436.

In *Jones*, the court permitted the jury to calculate the economic cost of child rearing by weighing the expense against the worth of the child's companionship, comfort and aid to the parents. The court stated that the calculations of the cost of child rearing are based on well-recognized economic factors regularly made by estate planners and insurance companies and are fully appreciated by the average citizen's own family experience. *Id.* at 272, 473 A. 2d at 436. The jury was to assess the benefits of family life, taking into account such factors as the family size, the parents' income, the age of the parents, and the motivating factor for sterilization and then offset these intangible benefits against the economic cost of child rearing. *Id.* at 272, 473 A. 2d at 436-437. See, also, *Ochs v. Borrelli* (1982), 187 Conn. 253, 445 A. 2d 883.

However, this approach has been criticized as essentially comparing apples to oranges because it

requires the jury to compare pecuniary costs with non-pecuniary benefits and then offset the economic costs of child rearing with these intangible benefits.[3]

Additionally, the benefits rule fails to literally comply with the Restatement's benefits rule, which pertains only when the harm and benefit occur to the *same interest.* "Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited. *** Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of support-[54]-ing the wife." 4 Restatement of the Law 2d, Torts (1979) 510, Section 920, Comment *b.* In a wrongful pregnancy case, the central damage alleged is to the plaintiff's financial interest in limiting family size, while the benefits resulting from the birth of the child are basically non-financial in nature.

Another criticism of the tort benefits rule is that it "*** smacks of condemnation law, where the trier of fact determines the value of the land taken by the condemnor. The trier of fact then determines the benefit that results to the land owner, which benefit is deducted from the original value to determine the proper award. If the concept of benefit or offset were applied to *** actions [for wrongful pregnancy], we can conceive of the ridiculous result that benefits could be greater than damages, in which event someone could argue that the parents would owe something to the tortfeasors. We think that a child should not be viewed as a piece of

[3] At least one court has suggested that such intangible benefits may be discounted by intangible costs, *i.e.*, the frustrations and disappointments of child rearing. See *Univ. of Arizona Health Sciences Center v. Superior Court* (1983), 136 Ariz. 579, 584-586, 667 P. 2d 1294, 1299-1301.

property, with fact finders first assessing the expense and damage incurred because of a child's life, then deducting the value of that child's life. ***" *Beardsley v. Wierdsma* (Wyo. 1982), 650 P. 2d 288, 293.

We conclude this section with a detailed explanation of the benefits rule found in *Univ. of Arizona Health Sciences Center v. Superior Court* (1983), 136 Ariz. 579, 667 P. 2d 1294:

> "In most cases we could join in the 'universally shared emotion and sentiment' expressed by the *** [rule denying recovery of child-rearing costs], but we do not believe we hold office to impose our views of morality by deciding cases on the basis of personal emotion and sentiment, though we realize we cannot and should not escape the effect of human characteristics shared by all mankind. However, we believe our function is to leave the emotion and sentiment to others and attempt to examine the problem with logic and by application of the relevant principles of law. In this case, we believe that the strict rule [denying recovery of child-rearing costs] is based upon an emotional premise and ignores logical considerations. While we recognize that in most cases a family can and will adjust to the birth of the child, even though they had not desired to have it, we must recognize also that there are cases where the birth of an unplanned child can cause serious emotional or economic problems to the parents. ***
>
> "***
>
> "In our view, the preferable rule is that followed by the courts which, although permitting the trier of fact to consider both pecuniary and non-pecuniary elements of damage which pertain to the rearing and education of the child, also require it to consider the question of offsetting the pecuniary and non-pecuniary benefits which the parents will receive

from the parental relationship with the child. Some may fear that adoption of such a rule will permit juries to recognize elements of damage which, because of our private philosophy or views of ethics, we, as judges, believe should not be recognized. We feel, however, that the consensus of a cross-section of the community on such important issues is better and more accurately obtained from the verdict of a jury than from the decision of any particular group of that community. A jury verdict based on knowledge of all relevant circumstances is a better reflection of whether real damage exists in each case than can be obtained from use of any abstract, iron-clad rule which some courts would adopt and apply regardless of the circumstances of the particular case.

"There may be those who fear that the rule which we adopt will permit the award of damages where no real injury [55] exists. We feel this danger is minimized by giving weight and consideration in each case to the plaintiffs' reasons for submitting to sterilization procedures. Such evidence is perhaps the most relevant information on the question of whether the subsequent birth of a child actually constitutes damage to the parents. ***

"It may be argued also that the rule which we adopt will have the unhappy effect of creating situations in which parents will testify to their feeling or opinion that the child is 'not worth' the burden of having and rearing. Such testimony could be harmful if or when the child learns of it. 'We are not convinced that the effect on the child will be significantly detrimental in every case, or even in most cases; *** we think the parents, not the courts, are the ones who must weigh the risk.' ***

"***

"In reaching our decision, we are influenced greatly by what we perceive to be the uniform rules of damages for all tort cases. One of the basic principles of damage law is the concept that a wrongdoer may be held liable for all damages which he may have caused and all costs which the victim may sustain as a result of the wrong. ***

"We see no reason why ordinary damage rules, applicable to all other tort cases, should not be applicable to this situation. ***" (Footnotes and citations omitted.) *Univ. of Arizona, supra,* at 583-586, 667 P. 2d at 1298-1301.

C

Limited Damages

The vast majority of jurisdictions which have decided the issue adheres to this theory of damages which denies all *child-rearing expenses.* Refusal to permit recovery has been based upon various considerations:

1. A parent cannot be said to have been damaged by the birth of a normal, healthy child because the benefits of having a child outweigh any economic loss which the parents might incur in rearing and educating a healthy child. *Public Health Trust v. Brown* (Fla. 1980), 388 So. 2d 1084, petition for review denied (Fla. 1981), 399 So. 2d 1140.

> "[T]he satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents are undoubtedly the things that make life worthwhile. Who can place a price tag on a child's smile or the parental pride in a child's achievement? *** Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child. ***" *Terrell v. Garcia* (Tex. App. 1973), 496 S.W. 2d 124, 128, certiorari denied (1974), 415 U.S. 927.

128, certiorari denied (1974), 415 U.S. 927.

2. Child-rearing expenses will be a windfall to the parents, wholly disproportionate to the doctor's culpability.

In *McKernan v. Aasheim* (1984), 102 Wash. 2d 411, 415-416, 687 P. 2d 850, 853, a wrongful pregnancy case (which, unfortunately, includes other than wrongful

pregnancy language), quoting *Rieck v. Medical Protective Co.* (1974), 64 Wis. 2d 514, 518-519, 219 N.W. 2d 242, 244, the court said:

> " 'To permit the parents to keep their child and shift the entire cost of its upbringing to a physician who failed to determine or inform them of the fact of the pregnancy would be to create a new category of surrogate parent. Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievements, every contribution by the child to the [56] welfare and well-being of the family and parents, is to remain with the mother and father. For the most part, these are intangible benefits, but they are nonetheless real. On the other hand, every financial cost or detriment—what the complaint terms 'hard money damages'—including the cost of food, clothing and education, would be shifted to the physician who allegedly failed to timely diagnose the fact of pregnancy. We hold that such result would be wholly out of proportion to the culpability involved, and that the allowance of recovery would place too unreasonable a burden upon physicians, under the facts and circumstances here alleged.' "

3. Another rationale is that the cost of child-rearing would be too speculative to measure with any certainty.

> "*** [I]t seems to us that that kind of judgment [recovery for child-rearing costs], if appropriate at all in an American Court of law, might be applied at the end of a life, after it has been lived and when the facts can be identified. But, in our view, any attempt to apply it at birth can only be an exercise in prophecy, an undertaking not within the speciality of our factfinders." *Coleman v. Garrison* (Del. 1975), 349 A. 2d 8, 12.

4. Recovery should be denied to protect the mental and emotional health of the child, sometimes harshly described as an "emotional bastard."

Courts are concerned that if they grant child-rearing costs to the parents in a "wrongful pregnancy" case, that one day the child will learn that he or she was not only unwanted by his or her parents, but was reared by funds supplied by another person, and that this will greatly upset the child. *Byrd v. Wesley Medical Ctr.* (1985), 237 Kan. 215, 221-222, 699 P. 2d 459, 466-467.

5. Damages for a "wrongful pregnancy" action should not include child-rearing costs since to allow damages would be the equivalent of allowing damages in an action for "wrongful life."

The appellees argue that this court should follow the reasoning in *Jackson v. Bumgardner* (1986), 318 N.C. 172, 181-182, 347 S.E. 2d 743, 748-749. In *Jackson*, the court did not allow damages for the cost of rearing the child because it found, in essence, that such damages would convert an action for "wrongful pregnancy" to an action for "wrongful life," which that court had previously found was not a cognizable injury.

Nevertheless, this court in *Bowman, supra*, specifically disapproved of categorizing a "wrongful pregnancy" action as a "wrongful life" action. Thus, we decline to follow *Jackson's* reasoning.

D

Full Recovery

This rule has little, if any, support. However, at least one court considers *Custodio v. Bauer* (1967), 251 Cal. App. 2d 303, 59 Cal. Rptr. 453, to be a full recovery case. See *Smith v. Gore, supra*, at 742. A California appellate court in *Custodio*, applying general tort principles, found that a child is a foreseeable consequence of a failed sterilization procedure and stated that if a "change in the family status can be measured economically it should be as compensable as the *** [other] losses." *Custodio, supra*, at 323-324, 59 Cal. Rptr. at 476.[4]

[57] Several courts contend that *Bowman* adhered to the rule allowing a full recovery of damages.[5] However, as we stated previously, *Bowman* did not address the measure of damages recoverable in a "wrongful pregnancy" case.

Appellant argues that she is entitled to a full recovery because all the expenses for child support are foreseeable and proximately caused by the negligent sterilization.

Proximate causation involves several factors in addition to the cause-and-effect logic of scientific inquiry:

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[4] The law in California on this issue, however, appears to be unsettled. A subsequent California appellate case, *Stills v. Gratton* (1976), 55 Cal. App. 3d 698, 127 Cal. Rptr. 652, while recognizing the rule in *Custodio*, adopted the benefits rule.

[5] See *Smith v. Gore* (Tenn. 1987), 728 S.W. 2d 738, 742-743; *Fulton-DeKalb Hosp. Auth. v. Graves* (1984), 252 Ga. 441, 444, 314 S.E. 2d 653, 655. However, other courts have recognized that in *Bowman*, we expressly declined to rule on the issue of whether damages should be limited to the pregnancy because the issue was not before the court. *E.g., Miller v. Johnson* (1986), 231 Va. 177, 186, 343 S.E. 2d 301, 306 fn. 2; *Byrd v. Wesley Medical Ctr.* (1985), 237 Kan. 215, 218, 699 P. 2d 459, 462.

" 'Proximate cause'—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.' As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

"This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains. Often to greater extent, however, the legal limitation on the scope of liability is associated with policy—with our more or less inadequately expressed ideas of what justice demands ***." (Footnote omitted.) Prosser & Keeton, Law of Torts (5 Ed. 1984) 264, Section 41.

III

In regard to the extent of damages, a number of courts have discussed the reasonableness of the alternatives to rearing a child, *i.e.*, an abortion or adoption, as part of the duty to mitigate.

Appellees have contended that if this court adopts the tort benefits rule, parents would have to mitigate their damages for child rearing by adoption or abortion. Appellees further argue that if the parents choose neither to abort nor adopt and instead keep the child, the jury would have to take this lack of mitigation into consideration when calculating child-rearing expenses.

According to 4 Restatement of the Law 2d, Torts (1979) 500, Section 918(1)[6]:

> "*** [O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of *reasonable effort* or expenditure after the commission of the tort." (Emphasis added.)

We refuse to say as a matter of law that every parent must mitigate damages by abortion or adoption as a "rea-[58]-sonable effort" to avoid child-rearing expenses. In fact, we find either suggestion repugnant. Many people would be opposed to either recourse. Thus, in a "wrongful pregnancy" action, the mother need not mitigate damages by abortion or adoption since a tort victim has no duty to make *unreasonable* efforts to diminish or avoid prospective damages.

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[6] 4 Restatement of the Law 2d, Torts (1979) 500, Section 918, is designated "Avoidable Consequences."

IV

We come now to decide which course of action is best for Ohio. In doing so, we comment that this has been one of the most difficult cases we have been called upon to decide. Our occupational duty continuously requires us to balance rights and responsibilities of persons regardless of their color, sex, position or station in life. We accomplish that balancing in this case while recognizing that our decision will be something less than universally accepted.

We reject the "no recovery" rule as being one that is clearly in conflict with the traditional concepts of tort law. Certainly, in the case now before us, there was a duty and a breach of that duty which was the proximate cause of damage. What damages should be allowed is the more difficult question.

Likewise, we are opposed to following the benefits rule because of the impossibility of a jury placing a price tag on a child's benefits to her parents. We are not in the business of placing a value on a smile or quantifying the negative impact of a temper tantrum. We are not qualified to judge whether a child might become President or a hopeless derelict. We cannot pretend to know what the future may hold—and neither can or may a jury!

Furthermore, we are not persuaded to adopt the full recovery rule because the strict rules of tort should not be applied to an action to which they are not suited, such as a wrongful pregnancy case, in which a doctor's tortious conduct permits to occur the birth of a child rather than the causing of an injury.

After reviewing the four theories of recovery, we find the limited damages theory is the most persuasive rule. In Ohio, a tort recovery may not be had for damages

which are speculative. See *Day v. Gulley* (1963), 175 Ohio St. 83, 23 O.O. 2ed 382, 191 N.E. 2d 732. Allowing a jury to award child-rearing costs would be to invite unduly speculative and ethically questionable assessments of such matters as the emotional effect of a birth on siblings as well as parents, and the emotional as well as the pecuniary costs of raising an unplanned and, perhaps, unwanted child in varying family environments.

Additionally, these speculative expenses for child rearing in a "wrongful pregnancy" action were not recognized at common law, just as damages were not recognized in an action for "wrongful death." We believe that if such expenses are to be recognized, it is the role of the General Assembly to establish guidelines in a "wrongful pregnancy" action as the legislature has done in allowing damages in "wrongful death" actions.[7]

Thus, in a "wrongful pregnancy" action, Ohio recognizes the "limited damages" rule which limits the damages to the pregnancy itself[8] and does not include child-rearing expenses. The extent of recoverable damages is limited by Ohio's public policy that the [59] birth of a normal, healthy child cannot be an injury to her parents.

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[7] In Ohio, the action for wrongful death was created by statute in 1851 and now appears at R.C. Chapter 2125. See 2 Revised Statutes of Ohio (1860) 1139-1140.

[8] These damages may include, but are not limited to, medical expenses and loss of consortium during the pregnancy and birth, emotional distress during that time, the mother's lost wages during a reasonable length of time, and the mother's pain and suffering during the pregnancy and childbirth.

We are aware of the possible hardships that might result from today's decision and we are not blind to the economic realities that accompany the rearing of a child. However, if liability is to be extended in such cases to child-rearing expenses, then the General Assembly is the proper forum in which the competing social philosophies involved in "wrongful pregnancy" actions should be considered in establishing the law.

Accordingly, based on the foregoing reasons, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, HOLMES, WRIGHT and RESNICK, JJ., concur.

H. BROWN, J., dissents.

H. BROWN, J., dissenting. The decision not to have children or to limit the size of a family is the lawful prerogative of any couple and of any mother. Our charge is not to weigh the moral values in making that choice. It is not for us to decide whether a couple errs when they elect to have no children. It is not for us to say whether a couple with three children makes a wise choice when they decide to have no more children in order to concentrate their resources on adequate support for the existing children.

The decision reached by the majority today penalizes the mother (or the couple) who makes these lawful choices. The penalty it extracts is to deny a recovery for damages caused by the negligence of another. This denial violates principles which are well established in the law of negligence.

Recovery for negligence is grounded upon four elements: (1) a duty by the defendant to the plaintiff, (2) a breach of that duty (failure to act with due care), (3) a proximate cause relationship between the breach of duty and the resulting damages, and (4) provable damages.

Where a doctor undertakes to perform a tubal ligation for a woman to prevent the conception of children, a duty arises between the doctor and his patient. If the doctor performs this procedure negligently, there is a breach. The proximate result of the breach is the birth of a child. The cost of rearing a child can be measured. It is far less speculative than many, if not most, types of damage which are recoverable in a civil action. Pain and suffering, damage for the injury itself (*i.e.*, loss of an arm), loss of consortium, loss of earning potential, and even future medical expenses, are all more speculative to gauge than is the cost of rearing a child. Studies and statistics abound to help measure the cost of rearing a child. The costs of child rearing are routinely computed in insurance and estate planning. *Jones v. Malinowski* (1984), 299 Md. 257, 272, 473 A. 2d 429, 436. Juries frequently calculate such costs in personal injury and wrongful death cases.

The position taken by the majority does not challenge the above reasoning. Instead, the majority chooses to deny recovery to one group of plaintiffs (and grant immunity to one group of tortfeasors) on the ground of public policy.

The application of public policy as a rationale to determine tort recovery is not warranted in this case. As previously noted, the choice of the mother (or couple) is a lawful one. This court should not treat that choice as unlaw-[60]ful by imposing a denial of rights to those who

make it. Further, the public policy of Ohio which underlies the majority position is inconsistent with the public policy as set forth in *Bowman v. Davis* (1976), 48 Ohio St. 2d 41, 45-46, 2 O.O. 3d 133, 135-136, 356 N.E. 2d 496, 499:

> "*** [W]e must further determine *whether an action following a negligently performed and 'unsuccessful sterilization procedure' is against public policy.*
>
> "It is the opinion of this court that the cause of action pursued successfully by the Bowmans at the trial and appellate levels *is not barred by notions of public policy.* The choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a Constitutional guarantee. See *Griswold v. Connecticut* (1965), 381 U.S. 479; *Roe v. Wade* (1973), 410 U.S. 113; and *Doe v. Bolton* ((1973), 410 U.S. 179. *For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right.*" (Emphasis added in part.)

Although *Bowman* did not specifically decide the proper standard for the measuring of damages for negligent sterilization cases (because the issue was not raised at the appellate level), it found that public policy did not preclude a sterilization case from being treated like other tort cases.

There is a still greater error underlying the public policy assumption on which the majority's decision rests. Our decision need *not* wrestle with the worth of human life, or "placing a value on a smile or quantifying the negative impact of a temper tantrum," as the majority so poignantly puts the issue.

This case is *not* about whether Ruth Johnson wants to keep her child. Johnson does not want to give up her baby girl. Now that the child is born she will do her best, within her resources, to raise and love the child. The mother has accepted the inevitable, and loves and wishes to raise her child. This does not erase the fact of injury and resulting damages. As one court has observed:

> "*** [T]he injury to the parents of a normal child does not reside in the product of the negligent act, *i.e.*, the child itself; damages are not sought on the child's behalf in such cases. Nor do the claimed damages have any relation to the child's value or worth vis-a-vis the expenditures necessary to raise her. *The parents seek damages,* not because they do not love and want to keep the unplanned child, but *because the direct, foreseeable and natural consequences of the physician's negligence has* [*sic*] *forced upon them burdens which they sought and had a right to avoid by submitting to sterilization.*" (Emphasis added.) *Jones, supra,* at 270, 473 A. 2d at 435-436.

To properly analyze this case, it is necessary to go back in time to the point where Ruth Johnson made her lawful choice not to have a child. That choice was thwarted by the negligence of the defendant. The consequence is measurable and Johnson should recover the damages caused by the frustration of her choice.

To inject the unmeasurable value of a human life (the baby) into the argument is to charge the issues with misdirected emotions. In a wrongful death case we do not allow recovery for the value of the life that has been lost. We do not value lost smiles. We do not allow such recovery for the good reason that it cannot be measured. By the same logic we should not deprive a plaintiff of measurable damages flowing from a tort because smiles and temper tantrums cannot be valued.

[61] The inconsistency in the majority's application of tort law to this case is demonstrated by the majority's willingness to recognize damages for "the pregnancy itself." There is no rational difference between the damages caused by "the [wrongful] pregnancy itself" and the child-rearing expenses. The cost of the pregnancy can no more be balanced against "the value *** [of] a smile" than can the child-rearing expenses.[9]

The majority expresses concern that a child may experience emotional harm by discovering that the parents did not desire the child's conception. Such concern is disingenuous. The child may draw the same conclusion from the fact that a suit has been filed to recover the expenses of pregnancy and childbirth. Surely the majority cannot believe that refusal to recognize child-rearing expenses as damages will result in Johnson's child being raised in a more loving, nurturing environment.

This court should follow well-established principles of tort law and allow the plaintiff to recover the readily measurable damages which were proximately caused by the defendants' negligence. Accordingly, I dissent.

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[9] I agree with Judge Markus' dissent in the case below in making the point that we should not distinguish between "healthy" and "abnormal" children born as a result of negligent medical treatment. The only difference should be one of assessing the amount of damages, not one of whether damages should be awarded.